Case No.: 15-16909

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOE I, DOE II, Ivy HE, DOE III, DOE IV, DOE V, DOE VI, ROE VII, Charles LEE, ROE VIII, DOE IX, LIU Guifu, WANG Weiyu, individually and on behalf of proposed class members,

Plaintiffs-Appellants,

vs.

CISCO SYSTEMS, INC., John CHAMBERS, Fredy CHEUNG, and Does 1-100
Defendants-Appellees.

On Appeal from United States District Court for the Northern District of California, No. 5-11-cv-02449-EJD, Honorable Edward J. Davila, United States District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Cases - Continued

Other Authorities

I. INTRODUCTION

The Supreme Court's recent decision in *Jesner v. Arab Bank, PLC,* 138 S. Ct 1386 (2018), holds that foreign corporations are not subject to suit under the Alien Tort Statute ("ATS"), because of foreign policy considerations inherent in subjecting foreign corporations to liability for international law violations. *Id.* at 1406, 1408. By contrast, the corporate defendant here — Cisco — is a U.S. corporation that aided and abetted and furthered the alleged violations on U.S. soil. *See, e.g.*, Dkt. No. 45 ("Index of Relevant SAC Allegations"). The concerns raised in *Jesner* do not apply here, and *Jesner* also further supports that the operative extraterritoriality test for ATS claims is whether they "touch and concern" the United States.

II. THE CONCERNS RAISED IN *JESNER* DO NOT APPLY HERE.

The *Jesner* Court explicitly declined to rule on the issue of whether ATS claims could be brought against U.S. corporations. 138 S.Ct. at 1403. Moreover, nothing in the *Jesner* holding or reasoning undermines this Court's controlling decision in *Doe v. Nestle*, 766 F. 3d 1013, 1022 (9th Cir 2014), holding that there was corporate liability under the ATS.[1] The *Jesner* Court declined to resolve the

[1] The violations alleged here — crimes against humanity, including persecution, torture, and extrajudicial killing — provide the bases for ATS claims against a corporation. Apart from the fact that these crimes against humanity violate *jus cogens* norms, *see* Appellants' Reply Brief at 24–25, they do not depend on the

Circuit split in which the Second Circuit has found no corporate liability and all other Circuits to have addressed the issue have found corporate liability.[2] Thus, this Court's prior holding in *Nestle* is controlling on this issue and can only be modified by an en banc panel or the Supreme Court. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875–76 (9th Cir. 2014).[3]

The assertion of jurisdiction by U.S. courts over U.S. defendants' acts abroad is well established. *See, e.g.*, *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285–86 (1952); *Blackmer v. United States*, 284 U.S. 421 (1932). The *Jesner*

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identity of the perpetrator and are not limited to states. *Id.* at 13 n.4; *see also* Brief of Yale Law School as Amicus Curiae in Support of Petitioners, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (No. 16-499), *available at* http://www.scotusblog.com/wp-content/uploads/2017/07/16-499-tsac-Yale-Law-School-Center-For-Global-Legal-Challenges.pdf; *id.* at 11–15 (crimes against humanity prohibition is a specific, universal and obligatory norm that extends to corporations); *id.* at 19–23 (torture prohibition extends to corporations); *id.* at 24–27 (extrajudicial killing prohibition extends to corporations).

[2] *Compare Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1017-21 (7th Cir. 2011) (finding corporate liability under the ATS); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1020–22 (9th Cir. 2014) (same)*; Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 40–55 (D.C. Cir. 2011) (same), *vacated on other grounds*, 527 Fed.Appx. 7 (D.C. Cir. 2013), *with Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010) (finding no corporate liability under the ATS).

[3] There is a wealth of briefing on the underlying issue of corporate liability in both the *Kiobel* and *Jesner* cases. Of particular note are the amicus curiae briefs filed by the United States in both cases urging the Court to find that corporate liability be permitted under the ATS. Brief for the United States as Amicus Curiae Supporting Petitioners at 12–31, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491); Brief for the United States as Amicus Curiae Supporting Neither Party at 8–17, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (No. 16-499).

Court's concern about the protests of foreign governments regarding the application of the ATS to their own corporations is not raised by this case. For example, as the Court noted in footnote 21 of its decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), the government of South Africa issued such a protest in the context of several class actions targeting corporations that allegedly profited from apartheid. Once South African (and other foreign) corporations were dismissed as defendants, the South African government dropped its objection to continuing litigation against U.S. corporations for Apartheid-era crimes.[4] In *Kiobel v. Royal Dutch Petroleum, Inc*., 569 U.S. 108 (2013), the governments of the United Kingdom and the Netherlands protested the application of the ATS to their corporations, asserting that the exercise of such jurisdiction over their corporations itself violated international law. Brief of Governments of the United Kingdom et al. as Amicus Curiae in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491). Foreign governments have not been primarily concerned with the way that the United States polices behavior of its own corporations abroad.

There is no unique or inherent foreign policy concern when U.S. corporations are sued under the ATS. In this case, there has been no Statement of

[4] *See In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009); Letter from Jeffrey Radebe, Minister of Justice and Constitutional Dev. of S. Afr., to Judge Scheindlin (undated), *available at* https://tinyurl.com/ydayfdye.

Interest submitted by the U.S. government. See ER 123–137 (civil docket sheet showing no such document submitted). China has not issued any protest. *Id.* Even if China had protested, the United States has a strong interest in ensuring that its corporations are not contributing to widespread torture and religious persecution of a minority like the Falun Gong. Indeed, it has been U.S. foreign policy for decades to support those seeking human rights in China and to hold those contributing to such abuses accountable.[5] Moreover, in *Doe v. Qi*, 349 F. Supp. 2d

[5] Beginning in 2000 and up through and including 2009, the State Department Human Rights Reports on China have condemned the persecution of Falun Gong in China. *See, e.g.* Dep't of State, 2000 Human Rights Report on China (2000), *available at* http://www.state.gov/j/drl/rls/hrrpt/2000/eap/684.htm; *see also* Appellants' Opening Brief ("AOB") at 29. The United States Commission on International Religious Freedom (USCIRF), which evaluates the treatment of religious practices across the globe and issues an annual report with individual assessments of specific countries, consistently continues to condemn the crackdown on religious groups in China, including Falun Gong since 2003. *See, e.g.*, USCIRF, 2017 Annual Report of the USCIRF (2017), *available at* http://www.uscirf.gov/sites/default/files/2017.USCIRFAnnualReport.pdf (most recent Annual Report of the USCIRF, condemning China's violent suppression of such religions as Falun Gong, Tibetan Buddhism, Catholicism and Protestantism and the subjection of their members to unlawful imprisonment and torture). The U.S. Congress has also condemned the persecution of Falun Gong for their peaceful religious beliefs in numerous resolutions. *See e.g.*, H.R. 281, 113th Cong. (2014) (expressing concern over "large numbers of Falun Gong practitioners imprisoned for their religious beliefs"); *see also* AOB at 44-45 (describing the United States government's specific interests in ensuring corporations – and Cisco in particular – are not contributing to the persecution of the Falun Gong). U.S. courts, including this Court, regularly grant asylum claims on behalf of Falun Gong believers in light of the system of religious persecution against them in China. *See, e.g.*, *Houfu Zhao v. Mukasey*, 540 F.3d 1027, 1030 (9th Cir. 2008).

1258, 1306 (N.D.CA 2004), the district court issued a declaratory judgment against Chinese officials for abuses against Falun Gong. Appellants' Reply Brief 26. The court held that such relief was "consistent with" the State Department's pronouncements condemning such abuses, that a declaratory judgment does not command the state or its officials to do anything, and that the risk to U.S. foreign relations was "minimal." *Id.* at 1302–06. Plaintiffs' claims here are against *private U.S. parties*. Liability here would not require anything of China or its officials and would no more interfere with U.S. foreign policy than the judgment in *Qi*. *Id.*

III. *JESNER* REPEATEDLY REFERS TO THE TOUCH AND CONCERN TEST.

In addition, *Jesner* confirms that extraterritorial application for an ATS claim is determined by whether it 'touches and concerns' the United States, as held in *Kiobel* and *Nestle*.[6] *Nestle's* holding to that effect is binding on the panel unless Supreme Court law is "clearly irreconcilable". *Gomez*, 768 F.3d at 875–76. Supreme Court case law is not clearly irreconcilable. *RJR Nabisco, Inc. v. European Community* – which Appellees argued mandated a finding of clear irreconcilability with the "touch and concern test" – involved an unrelated statute, made no decision as to the ATS, did not suggest the "touch and concern" test for

[6] At oral argument Appellees disputed the matter and argued the "touch and concern" test had been erased by a separate "focus" or *Morrison* test, relying upon *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016).

the ATS was replaced by a "focus" test, and did nothing to otherwise modify the case-by-case test for ATS jurisdiction set out by the Supreme Court in *Kiobel*. *Jesner,* the only Supreme Court case to address an ATS claim since *Kiobel*, discussed the proper inquiry for ATS claims' extraterritorial application and unqualifiedly emphasized that it is whether allegations "touch and concern" the United States. 138 S. Ct. at 1398, 1406*; id.* at 1429, 1431 n. 8, 1436 (Sotomayor, J., dissenting).[7]

IV. CONCLUSION

In sum, there is nothing in the *Jesner* decision that prevents this Court from allowing these plaintiffs to prosecute this case under the ATS; indeed, the reasoning of *Jesner* supports the finding that this case touches and concerns the United States.

Dated: May 16, 2018.

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[7] Notably absent is any reference whatsoever to a "focus" or *Morrison* based test that Appellees suggested replaced the "touch and concern" test as courts' focal point for the extraterritoriality of ATS claims.

CERTIFICATE OF COMPLIANCE

The attached brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(A) or Circuit Rule 32-1 but complies with the 15 page limitation established by separate court order on April 25, 2018, per Docket no. 49. This brief is 6 pages in length.

Dated: May 16, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2018, I electronically filed the foregoing document APPELLANTS' SUPPLEMENTAL BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I hereby certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 16, 2018.

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